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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Review of the Syndication and	)	MM Docket No. 95-39
Financial Interest Rules, Sections	)	
73.659 - 73.663 of the Commissions Rules	)	

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COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

In 1993, the Commission acknowledged "that current market conditions alone do not justify retention of finsyn restrictions."[1] Out of "an abundance of caution," however, the Commission "took a phased approach toward deregulating in this area due to several non-market factors:" (1) the Commission wanted to see whether its predictions about market trends and network behavior were accurate; (2) it was worried about the "significant risk" to outlet diversity if the remaining restrictions were removed prematurely; and (3) it was also concerned about the potential for "unforeseen and disruptive" negative effects of rapid deregulation.[2] At the end of the phase-out period, the Commission correctly placed the burden of demonstrating any of these concerns were justified squarely on the shoulders of "those parties seeking continued restrictions."[3]

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[1] Memorandum Opinion and Order in MM Docket No. 90-162, October 22, 1993, par. 44.

[2] Notice of Proposed Rulemaking, par. 10.

[3] Id. at par. 1.

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The Court of Appeals found the fin/syn restrictions to be "pesky, irksome, anachronistic," and reflective of "a persistence of protectionist thinking that the Commission has discredited."[4] However, it held it was not an abuse of discretion for the Commission to decide to phase out the repeal of fin/syn, although the Court acknowledged it "might have preferred and certainly would not have forbidden an immediate rescission of restrictions whose mismatch with the current situation in the broadcast industry become more evident by the day."[5] But although the Court failed to find the Commission's decision "to proceed in a more cautious manner" was arbitrary or capricious, it admonished the Commission not to change its mind about deregulating the television program marketplace at the end of the specified phase-out period:

> "We suspect that the networks' real concern is not with the interim restrictions at all, but with the possibility that in the administrative proceeding that is to begin six months before the expiration of the restrictions the Commission (three of whose five members are new since the decision under review) may change its mind about deregulating the television program market. But if it does so, it had better have an excellent, a compelling reason. The three original networks are even weaker today than they were in March of last year when the decision to deregulate was made, and no doubt they will be weaker still next year when the new proceeding is to commence." (Ibid.)

In fact, the Court suggested that "[t]he television industry is changing so rapidly that we cannot exclude the possibility that

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4 Capital Cities/ABC v. FCC, 29 F.3d 309, 316 (7th Cir. 1994).

5 Ibid.

the interim restrictions will come to seem irrational before they are due to expire."[6]

In light of what has occurred in the two years since the Commission partially eliminated fin/syn restrictions, it is unimaginable that an "excellent" or "compelling" reason for continued regulation could exist, or that the proponents of continued regulation will be able to sustain the burden of proof on any relevant issue. All remaining fin/syn restrictions should therefore be eliminated immediately.

Market Trends and Network Behavior

1. As the 7th Circuit predicted, "[t]he three original networks are even weaker today than they were in March of last year [1993], when the decision to deregulate was made, and no doubt they will be weaker still next year [in 1995] when the new proceeding is to commence."[7] During the 1994-95 broadcast season, the three networks' prime time audience share dropped to a historic low of 57, representing a loss of 4 share points (7.4%), or 2.7 million viewing households, from the previous season.[8]

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6 Ibid.

7 Ibid.

8 Nielsen Television Index.

2. The competition faced by the three original networks continues to increase at Mach Speed:

- The Fox Network Gains Strength. In contrast to the three-network share decline, the Fox Network enjoyed a 6.9% increase in prime time viewing for the 1994-95 season, and beat CBS in attracting the 18-49 demographic most attractive to advertisers.[9] Since May, 1994, at least 21 station affiliates of NBC, ABC or CBS have switched to Fox.[10] Fox also had the resources to bid NFL football away from CBS at a price tag of $1.6 billion.[11] Those resources have just increased dramatically with a $2 billion cash infusion from MCI.[12]

- Cable Networks Grow In Number and Popularity. Prime time viewing of cable networks increased 11.2% during 1994-95, with the basic and pay cable's share rising to a 28.[13] In the last six months alone, 13 new cable networks have been launched and nearly 100 more networks are waiting in the wings.[14]

- UPN and WB Networks Are Successfully Launched. Two large Hollywood studios (Paramount and Warner Brothers), which are major producers of network and syndicated programming and major distributors of first-run and off-network syndicated programs, have launched competing broadcast networks.

- First-Run Syndication Is Thriving. First-run syndication continues to provide a significant alternative to networking. In 1994, local stations broadcast almost 200 different first-run syndicated

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[9] Nielsen Television Index.

[10] Broadcasting and Cable, December 5, 1994 at 50-56.

[11] Broadcasting and Cable, January 3, 1994 at 14-19.

[12] The New York Times, May 11, 1995.

[13] Nielsen Television Index.

[14] Broadcasting and Cable, May 8, 1995 at 28-30.

programs.[15]

- Direct Broadcast Satellite Systems Exceed All Expectations. Launched in late 1994, high power DBS, which offers subscribers over 100 channels of programming, has proven to be the most successful new consumer electronics technology in history.[16] Many sources estimate that DBS subscribers will exceed one million this year and 10 million by the year 2000.[17]

- The Promise of Telco/Video. The Regional Bell Operating Companies are implementing plans to get into the video distribution business. To date, the Commission has received at least 24 applications from local telephone companies to provide hundreds of channels of "video dialtone" service to a potential 8.5 million homes.[18]

3. There is absolutely no indication that allowing the networks freely to acquire financial interests and syndication rights in network programs has had any adverse consequences for "competition and diversity in television programming, program origination, and program delivery." (Notice of Proposed Rulemaking at par. 15):

- The ever-increasing number of new outlets vying for video programming ensures that producers will continue to have many competing buyers. The production community's bright future is brought home by the land rush to invest in DreamWorks SKG, the production

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[15] Paul Kagan Associates, TV Program Stats, January 23, 1995.

[16] Thompson Consumer Electronics, which produces DBS decoder boxes, sold twice as many units in the debut year of high power DBS service as it sold VCRs when that product was introduced in 1977. Multichannel News, January 16, 1995 at 3.

[17] Cablevision, November 14, 1994 at 6.

[18] First Report in CS Docket No. 94-48 (September 28, 1994) at par. 104.

company created by Steven Spielberg, Jeffrey Katzenberg and David Geffen. Announced last October, the venture has already attracted over $2 billion in capital from such investors as Microsoft founder Paul Allen ($500 million); Microsoft, Ziff Brothers Investments, Capital Cities/ABC and others (another $400 million).[19]

- The Regional Bell Operating Companies are investing hundreds of millions of dollars in programming ventures to feed their planned video distribution businesses:

  -- Bell Atlantic, Pacific Telesis and Nynex pledged $300 million to a new television programming and distribution venture. They hired Michael Ovitz, Hollywood power broker and head of the Creative Artists Agency, as a consultant to the venture, and hired Howard Stringer, the former President of CBS to run it;[20]

  -- Three other RBOCs -- BellSouth, Ameritech and SBC Communications -- have formed a $500 million joint venture with The Walt Disney Company to develop, market and deliver video programming to consumers;[21]

  -- U.S. West and Time Warner are jointly developing interactive television programming as part of the RBOC's $2.5 billion investment in the entertainment giant;[22]

  -- Nynex has a $1.2 billion investment in Viacom/Paramount to jointly pursue programming ventures.[23]

- The networks clearly have not favored in-house productions or productions in which they hold back-end rights. The networks continue to acquire the overwhelming majority of their prime time entertainment

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19 The New York Times, February 27, 1995; Newsweek, April 3, 1995; Fortune, April 17, 1995.

20 The Wall Street Journal, February 2, 1995; The New York Post, May 11, 1995.

21 Broadcasting and Cable, April 24, 1995 at 33.

22 The New York Post, May 11, 1995.

23 Ibid.

programs from outside producers, and have acquired back-end rights in only a small percentage of those programs. For example,

-- In every year since 1991, three-network in-house production of pilots has remained an essentially constant percentage of total pilots commissioned. Outside producers continue to represent over 80% of three-network pilot development.[24]

-- At the start of the 1993-94 broadcast season, only 7 new entertainment series placed on one of the three network's schedules was produced in-house. All 7 of those in-house productions have been canceled.[25] Thus, network produced shows do not get preferential treatment; they must succeed with the audience to survive.

-- For the entire 1993-94 season, over 77% of the entertainment series programs broadcast by the three networks were acquired from outside producers. The major Hollywood studios continued to dominate, accounting for 49% of entertainment series hours.[26] According to an analysis by Variety, at the beginning of the just-announced 1995-96 season, network in-house productions will account for only 22% of their regularly scheduled entertainment series programs, which represents a decline from the 1994-95 season. The major studios account for 70% of the series slated to premiere in September, 1995, and two-thirds of all hours of series programming.[27]

- If there is a threat to so-called "independent" producers, it comes from the continuing consolidation of the production industry into the hands of large

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24 Paul Kagan Associates, TV Program Stats, March 28, 1995.

25 The New York Times, April 17, 1995 at D-8.

26 An Economic Analysis of the Prime Time Access Rule, Economists Incorporated (March 7, 1995), submitted for the record in MM Docket No. 94-123, Appendix E. This Appendix tabulates the shares attributable to suppliers of network prime time entertainment series programs over time, ending with the last full broadcast season (1993-94).

27 Daily Variety, May 25, 1995, p. 1.

Hollywood studios and vertically-integrated production/distribution entities. Since the Commission's 1993 decision:

-- Castle Rock Entertainment, the "independent" producer of Seinfeld, has been acquired by Turner Broadcasting System;

-- Cannell Entertainment, the "independent" producer of The Commish, was acquired by New World Entertainment;

-- Spelling Entertainment, another major "independent" producer (Melrose Place, Beverly Hills 90210), was acquired by Blockbuster Entertainment, now part of Viacom/Paramount.[28]

No Adverse Effect On Outlet Diversity

1. There is no basis for concern that outlet diversity is anything but thriving under the relaxed fin/syn regime. In addition to all the new non-broadcast outlets for video programming described above, to quote INTV: "no one can deny independent television has grown and prospered."[29]

- According to INTV there are 546 stations that are not affiliated with NBC, ABC or CBS.[30] Excluding stations with religious, foreign language or home shopping formats, nearly 80% of these stations are now affiliated with the Fox, UPN or WB Networks. For these

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[28] U.S. News and World Report, April 10, 1995; Los Angeles Times, March 24, 1995; The Wall Street Journal, September 14, 1993.

[29] March 7, 1995 Comments of the Independent Television Association in MM Docket 94-123, Review of the Prime Time Access Rule, p. 22.

[30] Id. at Exhibit 1.

stations the label, "independent" is clearly a misnomer.[31] In any event, in addition to a steady supply of high quality programming from their respective networks,[32] these stations, as well as affiliates of the three networks and unaffiliated stations, all have access to programming from a vibrant first-run syndication market.

2. As the 7th Circuit pointed out "there are no convincing theoretical reasons... for expecting the networks to withhold programming from the independent stations in order to weaken them competitively, as by purchasing syndication rights and then refusing to syndicate to independent stations..."[33] Indeed, before 1970, when the networks could acquire such rights and were actively engaged in the syndication business, there was no evidence of either "affiliate favoritism" or "warehousing."[34] Today there are no reasons -- theoretical or otherwise -- to be concerned that total elimination of fin/syn restrictions would have any adverse consequence for outlet diversity.

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31 May 26, 1995 Reply Comments of NBC in MM Docket No. 94-123, pp. 10-11.

32 UPN launched with 2 hours of programming on each of 2 nights per week, and plans to program five nights a week in 4-5 years. The Wall Street Journal, January 3, 1995. The WB Network launched with 2 hours/week and eventually plans to program every night. Communications Daily, December 23, 1994.

33 Capital Cities/ABC v. FCC, supra, 39 F.3d at 316.

34 See, e.g., Network Television Broadcasting, 25 FCC2d 318, 331 (1970).

<u>Disruptive Effects of Rapid Deregulation</u>

The Commission has been promising to get rid of the fin/syn rules since 1983. By the time the rules were finally relaxed ten years later, the dominant producers and syndicators who have been protected from competition by the rules no longer could properly rely on their perpetuation. Even then they got another two year's grace period from the Commission. Is there any question that twelve years is more than enough time to prepare -- financially, operationally and psychologically -- for a level playing field?

NBC therefore urges the Commission to eliminate the remainder of the fin/syn rules immediately, rather than waiting for the November 10 sunset deadline. As documented above, the television marketplace continues to change at an accelerated pace. Negotiations between networks and producers occur all year round. NATPE, the major trade convention at which syndicated programs are sold, does not occur until January, but plans and preparation must commence well in advance. Every extra day that these rules remain in force diminishes the networks' ability to compete and to participate in the marketplace in a meaningful fashion.

*   *   *

NBC cannot imagine what new economic "theories" or marketplace "factoids" the proponents of fin/syn will dream up to try to convince the Commission to retain rules that should have been eliminated over a decade ago. We are certain, however, that they will not even come close to sustaining the burden of showing that <u>any</u> aspect of the fin/syn rules promotes <u>any</u> valid regulatory objective.

Respectfully submitted,

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